ION FILED
FEB 1 1984

No. 83-835

In The

Supreme Court of the United States

OCTOBER TERM, 1983

JOHNSON CITY CENTRAL SCHOOL DISTRICT and CASPER ROHLAND,

Petitioners,

— v. —

BARBARA QUACKENBUSH, for herself and on behalf of her infant son, JASON GAMBEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WESTERN NEW YORK DISABILITY LAW COALITION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ELIZABETH LOTTMAN SCHNEIDER
Statewide Youth Advocacy, Inc.
426 Powers Building
Rochester, New York 14614
(716) 454-5419

Counsel for Amicus Curiae

January 30, 1984.

No. 83-835

In The

Supreme Court of the United States

OCTOBER TERM, 1983

JOHNSON CITY CENTRAL SCHOOL DISTRICT and CASPER ROHLAND,

Petitioners,

— v. —

BARBARA QUACKENBUSH, for herself and on behalf of her infant son, JASON GAMBEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Western New York Disability Law Coalition (hereinafter "DLC") respectfully moves for leave to file the attached brief *amicus curiae* in opposition to the petition for a writ of certiorari in this case. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the DLC arises from its participation in oral argument and submission of a brief *amicus curiae* in this case in the Second Circuit; furthermore, its members have a strong interest in ensuring the availability of a judicial remedy when handicapped children are denied rights secured to them by the Constitution and by federal statutes.

The DLC is composed of private and public interest attorneys, advocates and organizations who provide representation and assistance to handicapped children and adults in matters affecting their legal rights.[1] DLC members represent plaintiffs in numerous pending cases which raise issues similar to those raised in this case.

In the instant case, counsel for the respondent has indicated that he disagrees with the holding of the Second Circuit and supports granting the petition for a writ of certiorari. *Amicus* will present to this Court reasons for denying the petition which will not be presented by the parties. Thus the arguments in the brief which *amicus* is requesting permission to file, if accepted by this Court, may be dispositive of the petition, and in any case will assist in providing the Court with a full exposition of the issues.

Respectfully submitted,

ELIZABETH LOTTMAN SCHNEIDER
Statewide Youth Advocacy, Inc.
426 Powers Building
Rochester, New York 14614
(716) 454-5419

Counsel for Amicus Curiae

January 30, 1984.

---

[1]Organizational members of the DLC include: Western New York Protection and Advocacy Office for the Developmentally Disabled, Neighborhood Legal Services, Inc.; Erie County Chapter of the New York State Association for Retarded Citizens, Inc.; Monroe County Coordinating Group on Developmental Disabilities; Statewide Youth Advocacy, Inc.; Mental Health Association of Erie County, Inc.; Southern Tier Legal Services; Greater Upstate Law Project; and State University of New York at Buffalo Law School Legal Assistance Program.

No. 83-835

In The

Supreme Court of the United States

OCTOBER TERM, 1983

JOHNSON CITY CENTRAL SCHOOL DISTRICT and CASPER ROHLAND,

Petitioners,

— v. —

BARBARA QUACKENBUSH, for herself and on behalf of her infant son, JASON GAMBEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Amicus curiae Western New York Disability Law Coalition respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's decision in this case. That decision is reported at 716 F.2d 141.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the statutes and constitutional provisions which appear in Appendices C and D to the petition, as well as additional sections of 20 U.S.C. § 1415 which were omitted from petitioners' Appendix. The full text of § 1415 is attached hereto as Appendix A.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented at pages 2-5 of the petition, with the following additional observations.

During oral argument of this case in the Court of Appeals, the Court asked counsel for petitioners whether his clients (the Johnson City Central School District and the Chairperson of the District's Committee on the Handicapped, Casper Rohland) had at any time or in any manner informed respondent Quackenbush (hereinafter referred to as "plaintiff") of her right to present a complaint and/or request a hearing regarding her son's special educational needs, as required by 20 U.S.C. § 1415(b). In response to this question, counsel for petitioners (hereinafter referred to as "the school district" or "Rohland") submitted to the Court of Appeals a Stipulation, signed by himself and counsel for plaintiff and dated two days after oral argument, which answered the Court's question in the negative. The Court of Appeals then rendered its decision in the case.

In that decision the Court of Appeals held that the judicial remedy provided to handicapped children and their parents in 20 U.S.C. § 1415(e)(2) is limited by its express terms to parties aggrieved by the findings and decision of an administrative agency after a hearing on a complaint. Plaintiff, having been denied access to this administrative procedure, had no claim under that section. The Court found that by so limiting § 1415(e)(2) Congress clearly intended to preserve a § 1983 remedy for "procedural deprivations whose effect was to prevent a handicapped child from ever reaching the stage of a final administrative determination." PA 15.[2]

The Court held that the complaint stated a cause of action for compensatory damages under § 1983 against the school

[2]References to the Court of Appeals' decision are to pages in the Appendix to the petition.

district "based upon its alleged policy to avoid providing expensive special educational services by preventing handicapped children from gaining access to the procedural safeguards guaranteed by the statute." *Id.* A § 1983 cause of action for compensatory and punitive damages was stated against Rohland, who was alleged to have altered plaintiff's consent-to-evaluation form to indicate that she did not consent to have her son evaluated. The school district could not be held liable for punitive damages.

Finally, the Court of Appeals noted that it was not passing on several other issues which had been addressed by the District Court but were not included in the § 1292(b) certified questions, including: whether damages are available under § 1415(e) (2); whether damages are available under § 504 of the Rehabilitation Act; and whether damages are available under § 1983 for alleged constitutional violations in cases involving the education of handicapped children.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW A NONFINAL JUDGMENT IN A CASE WHICH IS NOT RIPE FOR REVIEW.

This case comes to the Court for review of a denial of a motion to dismiss the complaint. In its present posture, the case simply does not present a question which is ripe for Supreme Court review.

First, the complaint itself was imprecisely drawn to an extent which exacerbated the Court of Appeals' difficulty in rendering a decision. This difficulty was evident from several statements in the Court of Appeals' opinion:

> Although the complaint does not allege what action the school district took on plaintiff's request for special services, we infer that the district took no action whatsoever from that time forward. PA 4.

> We also infer from the allegations that the district took no action on the request because Rowlind [*sic*], without plaintiff's authority, put a check mark on the form . . . . *Id.*
>
> As to the EHA, the district court found sufficient the broad assertion that defendants were on notice that Jason had a handicapping condition but did nothing. PA 6.
>
> As to the Rehabilitation Act, the court stated, inaccurately, that the complaint alleged that Jason had been excluded from the public schools solely because of his learning disability. Actually the complaint does not allege exclusion from the public schools, but only exclusion from "a free and appropriate special education." *Id.*
>
> In short, the district court did not err in refusing to dismiss, because, as we have interpreted the complaint, it sets forth a cause of action against the school district under § 1983 . . . . PA15.

Judge Weis, dissenting in the Court of Appeals, expressed clearly the Court's frustration with the posture of this case:

> It is unfortunate that this case reaches us in a posture where the question of law to be addressed is not as sharply defined as it would have been had the facts been developed more definitively in the district court. In view of the overlapping claims and the vague nature of the plaintiff's complaint, I harbor substantial doubt about the desirability of entertaining a section 1292(b) appeal in this case. PA 25.

Similar concerns militate against this Court granting a writ of certiorari in this case. It is contrary to the general practice of this Court to review a nonfinal judgment, such as one remanding the case to the District Court for trial. ***Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.***, 389 U.S. 327 (1967); ***Cobbledick v. United States***, 309 U.S. 323, 324-325 (1940); ***Hamilton-Brown Shoe Co. v.***

Wolf Bros. & Co., 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893).

In affirming the District Court's denial of the motion to dismiss, the Court of Appeals remanded this case for trial on the merits of the particular claim upheld by the Court, as well as upon a variety of claims not passed upon by the Court. Thus, it has not yet been determined whether or not the plaintiff will prevail, what if any damages will be proven to have resulted from the school district's and Rohland's acts, or upon what legal grounds any damages award will be based.

Furthermore, because a variety of legal claims are asserted in the complaint based on the same nucleus of operative facts, there is considerable uncertainty as to whether the ultimate resolution of this case at trial will turn on the legal issue presented here. The legal claims include: a cause of action pursuant to 42 U.S.C. § 1983 for violation of plaintiffs' rights under the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401 *et seq.*, which prevented plaintiffs from gaining access to the administrative and judicial remedies provided for in that statute; a cause of action pursuant to § 1983 for violation of plaintiffs' rights to due process of law and equal protection of the laws; and a cause of action pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, for discrimination on the basis of handicap. The viability of the latter two causes of action may well be affected by this Court's decisions in *Smith v. Robinson*, No. 82-2120, *cert. granted* October 31, 1983, and *Irving Independent School District v. Tatro*, No. 83-558, *cert. granted* December 5, 1983, to be argued and decided this term.[3]

The combination of factors described above clearly indicates that this case is not ripe for review by this Court. There has

[3]In light of the pendency of these related cases, particularly *Smith v. Robinson*, if the Court does not deny the writ of certiorari, it should defer consideration of the petition until *Smith* is decided.

been no trial on the merits to establish what, if any, damages have been suffered as a result of alleged illegal conduct. There has been no judicial determination as to which, if any, legal claims have been substantiated. Decisions in cases already pending in this Court may render the issue in this case even more academic than it is now. And, most importantly, the complaint itself, upon which any action by this Court would be based, is so imprecisely drawn as to obfuscate the factual and legal questions presented.

II. THIS CASE DOES NOT PRESENT THE QUESTIONS WHICH PETITIONERS WISH THIS COURT TO ADDRESS.

Contrary to petitioners' assertion that plaintiff's complaint states an "educational malpractice" claim, seeking damages for misclassification or inappropriate placement of a handicapped child, this case raises no such claim. Indeed, the school district herein never reached the point of determining whether or not plaintiff's son should be classified as handicapped or determining what placement would be appropriate. Rather, as the Court of Appeals stated, plaintiff's "complaint is that through a policy of the school district she was deprived of the opportunity to take advantage of the procedural safeguards offered by the statute." PA 13.

Many of the cases cited in the petition are distinguishable from the instant case in this very respect.[4] Typical of such cases is *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983), in which the plaintiff sought damages for harm alleged to have been caused by an inappropriate placement arrived at through proper use of § 1415 (b)-(c) administrative procedures. Also in this category is *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), relied on so heavily by petitioners. In noting that its decision in the instant case was not inconsistent with *Anderson*,

[4] *All* of the cases cited in the petition are distinguishable on their facts in that none involved a claim for damages based on a school district's failure to afford a handicapped child access to the procedures whereby the child's special educational needs could be determined. Indeed, the illegality alleged in this case — involving, *inter alia*, forgery on a parental consent form — is so unusual as to be virtually *sui generis*.

the Court of Appeals correctly pointed out that *Anderson* involved a plaintiff who had completed the administrative process established by § 1415 (b)-(c), not a plaintiff claiming denial of access to that process. Thus petitioners' asserted conflict among the circuits is more apparent than real.

Finally, the record in this case does not present the first question set forth in the petition.[5] There has not been, and will never be in the context of this case, any showing that education funds have been "diverted" to pay tort damages and attorneys' fees. Furthermore, as previously argued, damages are not sought in this case for errors in classification or placement, but for complete denial of access to the decision-making process.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ELIZABETH LOTTMAN SCHNEIDER
Statewide Youth Advocacy, Inc.
426 Powers Building
Rochester, New York 14614
(716) 454-5419

Counsel for Amicus Curiae

---

[5] If any question is presented in this case, it is:

> Where by school district policy a parent and child are denied information about and prevented from gaining access to the process whereby the child's special educational needs may be determined and met and the process whereby an administrative appeal may be taken from such determination, in violation of the requirements of the Education for All Handicapped Children Act, 20 U.S.C. §§1401 *et seq.*, do the parent and child state a cause of action for damages pursuant to 42 U.S.C. §1983?

However, as noted above, by the time this case is tried to conclusion, this issue very well may not be dispositive.

APPENDIX

APPENDIX A

§ 1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to

the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without

regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub. L. 91-230, Title VI, § 615, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.